GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
Compensation Review Board

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CRB No. 05-41

PATRICIA MORGAN,

Claimant –Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,

Employer– Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Robert R. Middleton
OHA No. 04-008; DCP No. LT5-DOC00879

William J. Howard, Esquire, for the Petitioner

Pamela L. Smith, Esquire, for the Respondent

Before: E. COOPER BROWN, *Acting Chief Administrative Appeals Judge,* JEFFREY P. RUSSELL, *Administrative Appeals Judge* and FLOYD LEWIS, *Acting Administrative Appeals Judge.*

FLOYD LEWIS, *Acting Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 1-623.28, 32-1521.01 and 32-1522 (2004), 7 DCMR § 118, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).[1]

[1]Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensatio88n claims arising under the District of Columbia Workers' Compensation Act of 1979, as

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on September 8, 2004, the Administrative Law Judge (ALJ) concluded that Claimant-Petitioner (Petitioner) was not entitled to an augmented disability compensation award based upon overtime pay. Petitioner now seeks review of that Compensation Order.

As grounds for the instant appeal, Petitioner asserts that the ALJ's conclusion is erroneous.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, as established by the Act and as contained in the governing regulations, is limited to making a determination as to whether the factual findings of the Compensation Order are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. D.C. Official Code § 1-623.28(a). "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. Dist of Columbia Dep't. of Employment Servs.* 834 A.2d 882 (D.C. App. 2003). Consistent with this scope of review, the CRB and this Review Panel are constrained to uphold a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review herein, Petitioner specifically asserts that where the employee is subject to mandatory overtime and had incurred a pattern of mandatory overtime, then the mandatory overtime pay should be included in the calculation for average weekly pay. Employer-Respondent (Respondent) counters by arguing that the ALJ correctly ruled that overtime pay should not be taken into account in calculating disability pay.

The Computation of Pay section of the Act, D.C. Official Code § 1-623.14(a)(1), defines overtime pay as "pay for hours of service in excess of a statutory or other basic workweek or other basic unit of work time, as observed by the employing establishment."

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amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

The ALJ, in resolving this dispute, noted that pursuant to D.C. Official Code § 1-623.14(e)(1), overtime pay is specifically precluded from consideration when calculating an injured employee's computation of pay and that there is nothing in the Act that allows an exception for mandatory overtime. As such, since there is no statutory authority for consideration of the persistent and mandatory nature of Petitioner's overtime work schedule, the ALJ concluded that Petitioner is not entitled to an augmented disability compensation award based on overtime pay. Final Compensation Order as 4-5.

After the instant matter was decided by the ALJ, the CRB recently reviewed this particular issue in *Lopez v. Dist. of Columbia Fire and Emergency Medical Servs. Dep't.,* CRB No. 07-04, OHA No. PBL 04-015 (March 25, 2005). In the *Lopez* case, the CRB specifically referred to D.C. Official Code § 1-623.14(d)(3), titled "Average annual earnings are determined as follows", which reads in pertinent part:

> If either of the foregoing methods of determining the average annual earnings cannot be applied reasonably and fairly, the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which he or she was working at the time of the injury having regard to the previous earnings of the employee in the District of Columbia government employment, and of other employees in the District of Columbia government in the same or most similar class working in the same or most similar employment in the same or neighboring location . . .

In the *Lopez* case it was found that "the mere labeling of wages as overtime should not automatically bring claimant's wages within the 'overtime exclusion', noting that "[t]his is a basic fairness concept . . . [and] excluding this amount of claimants' wages results in a compensation rate that does not 'reasonably represent the annual earning capacity of the injured employee' pursuant to § 1-624.14(d)(3)." *Lopez* also noted that Professor Larson emphasizes that the fairness and reasonable test should focus on whether the average weekly wage is an honest approximation of a claimant's probable future earning capacity (*Larson's Workers' Compensation Law,* "The Concept of Average Weekly Wage", Vol. 5, § 93.01). As a result, the CRB held that there should be an exception to D.C. Official Code § 1-623.14(e)(1) for mandatory overtime pay to augment the disability compensation rate, if it reasonably represents a claimant's annual earning capacity.

In *Lopez,* the CRB stressed that the overtime was mandatory, regular and recurring, required of other similarly situated employees, had an established history and was expected to continue. As such, it was appropriate to augment the compensation rate based upon mandatory overtime pay, since it reasonably represented the employee's annual earning capacity and was based upon the "basic workweek" established by the employing agency. In light of this decision, this Panel concludes that this matter should be remanded to the ALJ to determine whether Petitioner's mandatory overtime meets the requirements established in *Lopez* for an exception to the general overtime rule.

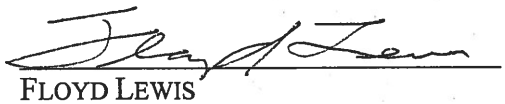
CONCLUSION

This matter is remanded to the ALJ for further findings of fact and conclusions of law to determine whether Petitioner's mandatory overtime meets the standards established in *Lopez v. Dist. of Columbia Fire and Emergency Medical Servs. Dep't.,* CRB No. 07-04, OHA No. PBL 04-015 (March 25, 2005).

ORDER

The Final Compensation Order of September 8, 2004 is hereby REVERSED and this matter is hereby REMANDED to the Administrative Hearings Division for further proceedings consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:



FLOYD LEWIS
Acting Administrative Appeals Judge

July 22, 2005
DATE